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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1958

No. 291

MURRAY WHITFIELD COULTER ET AL, .. Appellants

vs.

GARLAND ANTHONY ET AL, ... Appellees

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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INDEX

Page

Grounds in support of motion 1

Reasons why motion should be denied 2

Argument 3

1. The defects relied on by appellants were not mere irregularities cured by Act 142, but were jurisdictional defects beyond the power of the state to cure by legislative enactment 3
2. The decision of the state court does not rest on any adequate independent non-federal ground 6
3. The constitutional question was adequately and timely raised 8
4. The constitutional question is not foreclosed by prior decisions 11

CASES

Belcher v. Harr, 94 Ark. 221 6
Bonner v. Board of Directors, 77 Ark. 519 5
Bridge Proprietors v. Hoboken Land * * * Co., 1 Wall. 116 10
Brinkerhoff-Faris Tr. Co. v. Hill, 281 U.S. 673 11
Carle v. Gehl, 193 Ark. 1061 ..... 5, 6
Cecil v. Tisher & Friend, 206 Ark. 962 5
Chatfield v. Iowa & Ark. Land Co., 88 Ark. 395 6
Cissna v. Tennessee, 246 U.S. 289 10
Cocks v. Simmons, 55 Ark. 104 5
Consolidated Coal Co. v. Illinois, 185 U.S. 203 10
Cooper v. Foreman Lumber Co , 61 Ark. 36 4
Craig v. State of Missouri, 4 Pet. 410 9
Dansby v. Weeks, 199 Ark. 497 6
Davis v. Wechsler, 263 U.S. 22 7
Enterprise Irrigation District v. Farmers * * * Canal Co., 243 U.S. 157 7
Equitable Life Assur. Assoc. v. Brown, 187 U.S. 308 11
Fordyce v. Vickers, 99 Ark. 500 6
Furman v. Nichol, 8 Wall. 44 10
Great Northern R. Co. v. Sunburst Oil * * * Co., 287 U.S. 358 11
Harris v. Brady, 87 Ark. 428 6
Herndon v. Georgia, 295 U.S. 441 11
Hires v. Douglas, 198 Ark. 559 6
Illinois Cent. R. Co. v. Kentucky, 218 U.S. 551 10
Indiana v. Brand, 303 U.S. 95 10
Kalb v. Feuerstein, 308 U.S. 433 8

Page

Kaukauna Water Co. v. Green Bay * * * Co., 144 U.S. 254 ... 10
King v. West Virginia, 216 U.S. 92 ... 11, 12
La Cotts v. Quertermous, 83 Ark. 174 ... 6
Lawrence v. State Tax Commission, 286 U.S. 276 ... 7
Missouri v. Gehner, 281 U.S. 313 ... 11
Moseley v. Georgia St. Assoc., (Ark.) 224 S.W. 619 ... 6
New Jersey v. Anderson, 203 U.S. 483 ... 8
New York v. Zimmerman, 278 U.S. 63 ... 10
Ohio v. Akron Park District, 281 U.S. 74 ... 10
Postal Tel. & Cable Co. v. Newport, 247 U.S. 464 ... 7
Radcliffe v. Scruggs, 46 Ark. 96 ... 4
Saunders v. Shaw, 244 U.S. 317 ... 10
Smith v. Spillman, 135 Ark. 279 ... 4
Standard Oil Co. v. Johnson, 316 U.S. 481 ... 8
Standard Sec. Co. v. Republic M. & M. Co., 207 Ark. 335 ... 4
Stewart v. Comanche Mercantile Co., 147 S.W. 1166 ... 4
Sullivan v. Texas, 207 U.S. 416 ... 10
Wood v. Lovett, 313 U.S. 362 ... 11, 12

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GROUNDS ASSIGNED IN SUPPORT OF MOTION

Appellees move the Court to dismiss the appeal in this case for the reasons, as we understand them, that no substantial question is presented in that:

1. The defects asserted by appellants as rendering

the sale involved herein void were not jurisdictional defects but mere irregularities cured by Act 142 of 1935;

2. "The decision of the state court rests upon non-federal grounds adequate to support the decision";

3. "The constitutional question was raised for the first time in the petition for rehearing"; and

4. "The constitutional question * * * has been foreclosed by the former decisions of this Court" * * *.

REASONS WHY MOTION SHOULD BE DENIED

The motion to dismiss should be denied for the following reasons:

1. *The defects relied on by appellants were not mere irregularities cured by Act 142 of 1935, but were jurisdictional defects that the state was without power to cure by legislative enactment;*

2. *The decision of the state court does not rest on any adequate independent non-federal ground;*

3. *The constitutional question was adequately and timely raised;*

4. *The constitutional question presented is not foreclosed by the former decisions of this Court.*

ARGUMENT

1. *The defects relied on by appellants were not mere irregularities cured by Act 142 of 1935, but were jurisdictional defects that the state was without power to cure by legislative enactment.*

The defects relied on by appellants were incorporated as reasons "(1)", "(2)" and "(3)" of question "1", as set out in the Jurisdictional Statement, reason "(1)" dealing with the federal question of the result of the sale of the lands in question while they were in the custody of the bankruptcy court, without leave of that court, and for a claim provable in bankruptcy, but never proved or filed in the bankruptcy court; and reasons "(2)" and "(3)" dealing with the effect of the failure of the clerk to execute and file his certificate to the proof of the notice of sale within the time required by statute, and the effect of the sale of six of the forty-acre parcels that had been separately assessed pursuant to the mandatory provision of the controlling statute, but which were extended by the clerk on the tax records as three parcels of eighty acres each for the combined tax against both forties, and were so sold in combination by the sheriff.

It is not desired to supplement or enlarge upon what is said in the Jurisdictional Statement as to reason "(1)" of question "1", as set out in the Statement, dealing with the federal question; and reasons "(2)" and "(3)" will be discussed together, confining the discussion to cases that hold that the interest of appellants was a vested interest and that the defects here involved were jurisdictional ones that the state did not have the power to cure by legislative enactment.

That the interest of appellants was a vested interest

does not seem open to question, and probably needs no citation of authority. The doctrine is well stated in *Stewart* v. *Comanche Mercantile Co.*, 147 S.W. 1166 (Tex. Civ. App.):

> "The right to redeem is a property right which the trustee, of course, could have exercised [Re East Stroudsburg Supply & Construction Co., 248 F. 356 (D.C.); Fort Dearborn Trust & Savings Bank v. Smalley, 298 F. 45 (C.A. 8); In re Argyle-Lake Shore Building Corporation, 78 F. (2d) 491 (C.A.); Re Charles Hotel Co., 12 F. Supp. 736 (D.C.)]; and it was a right which the trustee might have exercised or have sold to someone else."

The rule seems well settled under the Arkansas decisions, both before and after the enactment of Act 142. It has always been the rule there that a meritorious defense could not be cut off by later legislation. It was so held in *Radcliffe* v. *Scruggs*, 46 Ark. 96, where it was said: "And by a meritorious defense we mean any act or omission of the revenue officers in violation of law and prejudicial to his rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or to sell for its nonpayment." In *Cooper* v. *Foreman Lumber Co.*, 61 Ark. 36, 31 S.W. 981, where a curative act was asserted as curing the defect here asserted under reason "(2)", the above rule was cited with approval, and the court added: "As indicated, under this holding, Section 13874 did not, and could not, cut off appellant's meritorious defense in the tax sale in question." In *Smith* v. *Spillman*, 135 Ark. 279, 205 S.W. 107, it is said that "We are of the opinion that * * * to extend the right of redemption beyond the period under the law as it stood at the time of the sale would be an impairment of the obligation of the contract, which is expressly forbidden, not only by the Constitution

of this state (Article 2, §17) but likewise by the Constitution of the United States." In this case, the period guaranteed to appellants under the state statute within which to bring their action was cut off. In *Carle* v. *Gehl*, 193 Ark. 1061, 104 S.W. (2d) 445, it was held that the total failure of the Clerk to file the certificate to the publication of the notice of sale was not cured by Act 142. In *Cecil* v. *Tisher and Friend*, 206 Ark. 962, 178 S.W. (2d) 655, it is said: "Did the failure of the clerk to attach his certificate * * * prior to the dates of sale, void the sale here in question? We think the failure of the Clerk to perform his duty as required by Section 13848 of Pope's Digest did avoid these sales, and was a jurisdictional defect." In *Standard Securities Co.* v. *Republic Mining & Mfg. Co.*, 207 Ark. 335, 180 S.W. (2d) 575, in which a curative act similar to the one here relied on by appellees was interposed as a defense, the court again quotes Radcliffe v. Scruggs with approval and adds: "As, indicated, under this holding, Section 13874 did not, and could not, cut off appellant's meritorious defense to the tax sale in question."

The question is no less firmly settled on the effect of the selling of the six forty-acre parcels separately assessed as three parcels of eighty acres each for the combined tax against both. The cases of the eighteen states that have passed on this point have been reviewed; and, insofar as we have been able to find, this case stands alone in sanctioning such a sale, whether the sale was of a single parcel for a tax not directly assessed against it, or a sale in combination of parcels separately assessed. In all cases, the rule seems to be that announced in *Cocks* v. *Simmons*, 55 Ark. 104, 17 S.W. 594, mentioned at page 19 of the jurisdictional statement. To the same effect are the later Arkansas cases. In *Bonner* v. *Board of Directors of St. Francis Levee Dis-*

trict, 77 Ark. 519, 92 S.W. 1124, it is said that "The statutes of this state provide * * * that lands shall be described on the delinquent lists as they are described in the tax books; and, impliedly, that they shall be sold in the same manner. Kirby's Dig. §§6976, 7024, 7083, 7085. The effect of these statutes is to prohibit the collector or other persons from changing the assessment of lands after the taxbooks have been delivered to the proper officer. The assessor is authorized only to make the assessment." To the same effect are *La Cotts* v. *Quertermous*, 83 Ark. 174, 103 S.W. 182; *Harris* v. *Brady*, 87 Ark. 428, 112 S.W. 974; *Chatfield* v. *Iowa & Ark. Land Co.*, 88 Ark. 395, 114 S. W. 473; *Belcher* v. *Harr*, 94 Ark. 221, 126 S.W. 714; *Fordyce* v. *Vickers*, 99 Ark. 500, 138 S.W. 1010; *Carle* v. *Gehl*, 193 Ark. 1061, 104 S.W. (2d) 445, where a curative act was invoked ("It is true, each separate lot was correctly described, but they were not assessed separately as provided by law, but together as one tract under a single valuation and were sold en masse for a lump sum. * * * We do not think that the assessment of the six lots as one tract was a valid and proper description, and, for this reason, appellant is in no position to invoke the curative features of the Act. We think any one of the foregoing reasons [one was a failure to file the certificate before the day of sale] * * * is sufficient to make the act inapplicable and to sustain the decree of the Court below"); *Moseley* v. *Georgia State Association*, ____ Ark. ____, 224 S.W. 619; *Hires* v. *Douglas*, 198 Ark. 559, 229 S.W. (2d) 959; *Dansby* v. *Weeks*, 199 Ark. 497, 235 S.W. (2d) 62.

2. *The decision of the state court does not rest on any adequate independent non-federal ground.*

It is conceded that the Supreme Court of the United States will not review an alleged constitutional infringe-

ment by a state court if the "decree of the state court rests upon a non-federal ground broad enough to support it." But what is the independent non-federal ground broad enough to support the decree in this case? Appellees do not tell us, and the cases cited by them in support of their assertion give us no hint of any such ground. There is no such independent or sufficient non-federal ground in this case. A decision in favor of appellants on either one of the reasons assigned under question "1" as set out in the Jurisdictional Statement would have entitled appellants to prevail. A failure to sustain either one would have been fatal to appellees' defense. A decision on each of the points was necessary. Neither was independent of the basic issue as to appellees; and, since the Federal question with respect to the sale of the lands without leave of the bankruptcy court while they were in the custody of that court would have been determinative of the outcome, it would not be important if there had been state grounds which, in the absence of the Federal question, might have sustained the judgment. All three of the issues were so interwoven with the Federal question as to become an integral part thereof and thus remove any independent or adequate status from either or all of them. * * * "Where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 61 L. Ed. 644, 649; *Postal Tel. & Cable Co.* v. *Newport*, 247 U.S. 464, 475; *Davis* v. *Wechsler*, 263 U.S. 22, 24; *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282.

3. *The constitutional question was adequately and timely raised.*

The suggestion that "the constitutional question was raised for the first time in the petition for rehearing" (p. 11 of motion) is not stressed by appellees. In any event, the question would have been without merit for two reasons: (1) the constitutional question was sufficiently raised in the state courts even without a petition for rehearing; and (2), if it had not been so raised, the question, under the circumstances of this case, was raised in apt time in the petition.

(1) The question of the effect of the sale of the lands while they were in the custody of the bankruptcy without leave of that court is a federal question on which this court would not be bound by the construction of the state court, but on which the ultimate construction must rest with this court. *New Jersey* v. *Anderson*, 203 U.S. 483, 491; *Kalb* v. *Feuerstein*, 308 U.S. 433; 438; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483. This question was specifically raised by appellants in their original complaint (R. 2). It was discussed (Ex. A-1, Ap. 5) but not decided by the trial court. It was discussed in the opinion of the State Supreme Court (R. 122-130, V. I., Ex. A-3, Ap. 17-18) and actually decided adversely to appellants (Ap. 17-18, 27) and in a manner in conflict with the decisions of this court (Jur. St. 12-15). This brings the question squarely in line with the requirements of this court for review on certiorari.

The holding of the State Supreme Court on the effect of the failure of the Clerk to file his certificate before the day of the sale to the effect that, "In the absence of a curative act this defect renders the sale void", necessarily involves a federal question which was decided adversely to

appellants. This issue is, likewise, subject to review on certiorari, omitting entirely the effect of its being interwoven with the constitutional question. On this point, the State Supreme Court said (R. 122-130, V. I., Ex, A-3, Ap. 18): "The question is whether the Clerk's belated execution of the certificate was an irregularity cured by Act 142, or a jurisdictional defect lying beyond the remedial power of the legislature?" The same question, if not explicitly asked, is clearly inferable with respect to the manner of the selling of the six forty-acre parcels. What was it that could have made these defects "a jurisdictional matter lying beyond the remedial power of the legislature?" There is but one answer: the due process clause of the Fourteenth Amendment to the Federal Constitution. Here are necessarily embodied the essential elements of the constitutional question presented. Did the State Supreme Court understand this? We must indulge the presumption that it did so understand. The holding that the defects assailed were mere irregularities cured by Act 142 was, in substance and in fact, a decision upholding the validity of the act adversely to the rights of appellants as against the necessarily implied constitutional prohibition of the due process clause above mentioned.

There is no set formula or collection of words required to raise a federal constitutional question, or to constitute a sufficient decision thereon to confer on this Court jurisdiction to review. The very early case of *Craig* v. *The State of Missouri*, 4 Pet. 410, 423-429, in which an almost identical procedural situation was presented, is particularly in point here. In the Craig case, no mention whatever of the state act was made in the pleadings, the only mention at all being the casual mention by the trial court in its judgment to the effect that the transaction involved was pur-

suant to "an Act of the Legislature * * * approved the 27th day of June, 1821, entitled" * * *. This court held that sufficient, since the question was necessarily involved. Other cases supporting the contention here made are *Bridge Proprietors* v. *Hoboken Land and Improvement Co.*, 1 Wall. 116, 141-142; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Kaukauna Water Power Co.* v. *Green Bay Mississippi Canal Co.*, 144 U.S. 254, 269; *Cissna* v. *Tennessee*, 246 U.S. 289; *New York* v. *Zimmerman*, 278 U.S. 63; *Indiana* v. *Brand*, 303 U.S. 95, 98.

(2) No question is raised as to the sufficiency of the petition for rehearing. It is merely suggested (and it is a suggestion only) that "the constitutional question was raised for the first time in the petition for rehearing."

In this case, the trial court passed on none of the issues presented in this appeal. The State Supreme Court passed on the federal question arising under the national bankruptcy act for the first time in its history, and in a manner apparently in conflict with the decisions of this Court, and with the decisions of the appellate federal Courts generally for the last quarter century; held, for the first time in its history that a curative act validated a tax sale concededly void at the time it was made; and held, for the first time, insofar as we have found, that, in substance, a sale of lands for taxes not assessed against them was a mere irregularity cured by Act 142 of 1935. The following cases hold that, in cases involving the foregoing elements, the raising of the constitutional question for the first time in a petition for rehearing, motion in arrest of judgment, or other similar pleading, is timely: *Consolidated Coal Co.* v. *Illinois*, 185 U.S. 203, 205-6; *Sullivan* v. *Texas*, 207 U.S. 416, 422; *Illinois Central Railroad* v. *Kentucky*, 218 U.S. 551, 555-6; *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Ohio* v. *Akron Park*

District, 281 U.S. 74; *State of Missouri* v. *Gehner*, 281 U.S. 313, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-8; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 356; *Herndon* v. *Georgia*, 295 U.S. 441, 444. The rule is too well settled to merit argument.

If the offending act had not been specifically brought in question in the pleadings in the trial court; if the constitutional question had not been necessarily involved and necessary to a decision; if the State Supreme Court had not, in fact, passed on the question — still, in view of the procedures followed by the State Supreme Court on January 20, 1958, in entertaining the petition for rehearing, in setting aside the original decree of November 4, 1957, in writing a supplemental opinion on the petition for rehearing, and reentering a final decree, it seems that all question as to the timeliness of the raising of the constitutional question should pass out of the case.

We should not worry overmuch about what (Motion 11) was not called to Judge Miller's attention in the companion case tried before him. The bankruptcy proceeding had been conducted in the court over which he presided. The complete records, of which he would have taken judicial notice, were before him. One reason for his not mentioning Wood v. Lovett could have been that he did not put the same construction on it that appellees seem to do.

4. *The constitutional question presented is not foreclosed by the former decisions of this Court.*

Appellees, in support of their assertion on this point, cite *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308; *King* v. *West Virginia*, 216 U.S. 92; and *Wood* v. *Lovett*, 313 U.S. 362. These cases do not support appellees'

assertion that "the constitutional question * * * has been foreclosed by the former decisions of this Court."

The decision in the Brown case does not touch the point at issue in this case. The question in that case was whether a judgment in favor of an administrator on an insurance policy rendered by the Supreme Court of the Territory of Hawaii should be declared invalid by reason of the fact that, at the time such judgment was rendered, there was a suit pending on the same policy in a New York Court brought by an administrator appointed in that state. This Court did uphold "the power to consider and sustain a motion to affirm * * * where the assignments of error on the merits are obviously and unquestionably frivolous," but there is nothing in the opinion that remotely indcates that the questions here presented are frivolous.

The decision in *King* v. *West Virginia*, 216 U.S. 92, is no more helpful than in the decision in the Brown case. The issues in the King case were entirely different from the issues in this case. The King case turned largely on a question of res judicata.

With respect to the decision in *Wood* v. *Lovett*, 313 U.S. 362, but little can be added, within our limitations, to what was said in the Jurisdictional Statement (p. 26). In the Wood case (p. 365), "It was agreed on all hands that, though these irregularities would have constituted grounds for avoiding the sale but for the provisions of the Act of 1935, *they would not have been available to the appellee if the Act were still in force*" (Italics supplied). In the present case, it is asserted, and supported by the authorities, that the irregularities were not such as would have been cured by the Act of 1935, but that they were jurisdictional defects that were not, and could not have

been, cured by any legislative enactment. The decision in the Wood case did nothing more than to reaffirm the rule that a vested title cannot be divested by later legislation, whether such later legislation is by enactment or repeal.

If the state has the power, as against a plea of lack of due process, to enact legislation which cuts off or cuts short the time guaranteed to the owners under a statute in force at the time of the enactment of such legislation within which, because of their disability of minority, they may bring their action to redeem, and which legislation, through an ex parte tax proceeding, divests the title of such minors, which they held at the time of the enactment of such legislation, then, indeed, is there no substantiality to the question here presented; but, since the validity of a state statute, for whatever reason assigned, cannot be sustained if its effect is to overturn rights vested at the time of the enactment of such statute, it is respectfully submitted that the motion to dismiss should be denied.

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